IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY DESHIELDS, Plaintiff,	:	CIVIL ACTION
v.	:	
JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	:	No. 02-8426

MEMORANDUM AND ORDER

J. M. KELLY, J. **FEBRUARY , 2004**

Presently before the Court are the Report and Recommendation of United States Magistrate Judge Charles B. Smith on cross-motions for summary judgment, and Plaintiff Stanley DeShields' ("Plaintiff") objections thereto. Plaintiff seeks judicial review of the decision of Defendant Commissioner of the Social Security Administration ("Defendant") denying his application for supplemental security income ("SSI") under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f. Magistrate Judge Smith recommends that the Court grant Defendant's motion for summary judgment and deny Plaintiff's motion for summary judgment. Upon careful and independent consideration of the administrative record, for the following reasons, this Court **OVERRULES** Plaintiff's objections, and **APPROVES** and **ADOPTS** Magistrate Judge Smith's Report and Recommendation. Accordingly, we **DENY** Plaintiff's motion for summary judgment and **GRANT** Defendant's motion for summary judgment.

I. BACKGROUND

A. Procedural History

Plaintiff filed a protective application for SSI on November 19, 1996, claiming disability due to a gunshot wound (cerebrovascular accident) in his spine, back pain, problems with his right shoulder, knee and foot, depression, hypertension, blurry vision and dizzy spells, shortness of breath and diabetes. (R. 21, 140-148, 241-244.) The claim was denied initially and on reconsideration. (R. 96-98, 101-103.)

Plaintiff then requested a hearing before an Administrative Law Judge ("ALJ"), which was originally scheduled for July 1, 1998. (R. 104, 108.) Due to an alleged transportation strike, Plaintiff did not attend on that date, and ALJ Malvin B. Eisenberg continued the hearing to November 17, 1998. (R. 37-38.) Plaintiff appeared at that hearing, without counsel, indicating that he believed a state attorney would be available to represent him.[1] (R. 38.) The ALJ rescheduled the hearing for January 14, 1999, to allow Plaintiff additional time to secure counsel. (R. 39-40, 44.) The ALJ emphasized, at that time, that the case would not be relisted again and that, if Plaintiff desired, Plaintiff was to obtain representation well in advance of the hearing date. (R. 40-43.)

---

[1] Plaintiff had previously been advised, by letter dated August 19, 1997, of both his right to representation and the availability of referral sources. (R. 106-07.)

On January 14, 1999, the hearing before the ALJ took place. (R. 44-91.) While still unrepresented, Plaintiff testified, along with vocational expert ("VE") Margaret Preno. Id. On June 25, 1999, the ALJ issued his decision finding Plaintiff not under a "disability" as defined in the Social Security Act. (R. 18-30.) The Appeals Council thereafter denied Plaintiff's request for review, making Defendant's decision to deny benefits final. (R. 8-9.)

Having engaged legal counsel, Plaintiff seeks judicial review of the ALJ's finding of "not disabled," and objects to Magistrate Judge Smith's Report and Recommendation. Specifically, Plaintiff contends that Defendant's denial must be reversed because substantial evidence does not support the conclusion that he can perform a limited range of light work. Plaintiff further contends that the ALJ based his determination on an inadequately developed record, failed to analyze the evidence presented, misapplied the legal standard for determining the severity of Plaintiff's impairments, and improperly relied on the VE's testimony that did not reflect all of the Plaintiff's impairments.

B. Factual Background

Plaintiff was born on October 18, 1946, making him fifty-two at the time of the ALJ's decision. (R. 59-60.) He has an

eleventh-grade education, and his past relevant work included positions as a tractor trailer driver with two different companies from October 1977 to November 1985. (R. 157, 172.)

1. Examination by Evelyn Sabugo, M.D.

On November 30, 1996, Plaintiff's family physician, Evelyn Sabugo, M.D., provided a medical source statement. She explained that she had been treating Plaintiff from June 1985 to November 1996 on a sporadic basis of two to three times per year. She diagnosed Plaintiff with hypertension, cardiovascular disease with seizures in April 1995 that affected his speech, low back pain as a result of a penetrating gunshot wound and weakness in his right arm. (R. 213.) She further noted that he has some parathesia in his upper right extremity. (R. 214.) The only treatment she prescribed for his back pain was rest and use of Lodine. (R. 213.) She also noted that Plaintiff took Cardizem daily (R. 215), which is used to treat high blood pressure. (R. 232.)

Dr. Sabugo's examination of that same date revealed no paravertebral muscle spasm and no atrophy, but did note positive straight leg raises on both legs. (R. 213-14.) Plaintiff's range of motion was normal in the cervical region, and slightly limited in the lumbar region. (R. 214.) Dr. Sabugo described Plaintiff's gait as steady and commented that he did not need an

assistive device for ambulation. (R. 214.) Observing Plaintiff's mobility/agility, Dr. Sabugo remarked that Plaintiff had difficulty walking on his heels and toes and squatting, but only slight difficulty getting on and off the examining table and no difficulty arising from a chair. (R. 215.) She opined that he could lift and carry up to twenty-five pounds frequently and up to fifty pounds occasionally. (R. 217.) Further, Dr. Sabugo stated that Plaintiff must periodically alternate sitting and standing at two-hour intervals, that he should only occasionally climb, stoop, kneel, crouch and crawl, and that he was limited in pulling and dexterity. (R. 217-18.) She gave him no limitations in standing, walking, balancing, pushing, seeing, hearing and speaking. (R. 217-18.)

In January 1997, Dr. Sabugo completed an Employability Assessment Form, indicating that Plaintiff would be temporarily disabled for a period of two months, until March 3, 1997. (R. 221.) At that time, Dr. Sabugo diagnosed him with hypertensive cardiovascular disease that was under control, with a secondary diagnosis of degenerative osteoarthritis in his back and weakness and numbness in his right arm. (R. 221.) She stated that her assessment of "temporarily disabled" was subject to further evaluation of the right arm weakness. (R. 221.)

2. Consultation with Martin Goldstein, M.D.

As recommended by Dr. Sabugo, on February 11, 1997, Plaintiff underwent consultation with neurologist Martin Goldstein, M.D., a state agency physician. Reviewing Plaintiff's history, Dr. Goldstein noted that Plaintiff had been shot in the shoulder thirty years prior and the bullet had lodged up against his spine before it was removed. (R. 222.) Plaintiff indicated that he continued to work at that time, but suffered multiple symptoms, including shortness of breath and pain in his back. (R. 222.) He further reported that, approximately a year-and-a-half prior, he had a seizure that "was some kind of a stroke," which caused temporary paralysis on his right side. (R. 222.) Although Plaintiff attempted to return to work as a tractor trailer driver following the stroke, he stated that he could not do so. (R. 222.) According to Dr. Goldstein's summary, Plaintiff was on Lodine twice a day for pain, Trental twice a day for circulation and Cardizem once a day for blood pressure. (R. 222.)

Upon neurological examination, Dr. Goldstein found Plaintiff to have full range of motion, but noted that he had pain at the extremes. (R. 222-23.) He had no pathologic reflexes of any kind. (R. 223.) Dr. Goldstein commented that Plaintiff maintained a fairly normal, although slow, gait and stood with his feet together. (R. 223.) His arm and grip strength on the

right was diminished, but only mildly. (R. 223.) Otherwise, he could do gross and dexterous manipulative functions, get on and off a chair without difficulty, dress and undress himself, hear, understand, produce and sustain normal speech. (R. 223.) While he bent forward with pain, he could bend his knees in order to reach his toes. (R. 223.) Further, Dr. Goldstein found no muscle atrophy or sensory deficit. Ultimately, he diagnosed Plaintiff as follows: (1) post-gunshot wound with back pain as described; (2) post-cerebrovascular accident with history of seizure and mild hemiparesis[2] on the right; and (3) adjustment disorder with depression by observation and patient's description of his unhappiness of not being able to work. (R. 223.) The prognosis was guarded. (R. 223.)

Dr. Goldstein also completed a Medical Source Statement of Claimant's Ability to Perform Work-Related Activities. (R. 224.) He opined that Plaintiff could occasionally lift and carry fifty pounds, could walk between two and six hours, sit for six or more hours and could only occasionally climb, balance, stoop, kneel, crouch and crawl. (R. 224-25.) Otherwise, Plaintiff had no limitation on pushing and pulling, reaching, dexterity, seeing, hearing and speaking. (R. 225.)

---

[2] Hemiparesis is a weakness affecting one side of the body. Stedman's Medical Dictionary (27th ed. 2000).

3. Review by Leland Patterson, M.D.

In March 1997, Leland Patterson, M.D., a state agency physician, reviewed Plaintiff's medical records to date and provided a Physical Residual Functional Capacity Assessment. He opined that Plaintiff could occasionally lift up to twenty pounds, frequently lift up to ten pounds, stand/walk about six hours, sit about six hours and was unlimited in pushing and pulling. (R. 206.) Further, Plaintiff had occasional limitations in climbing, balancing, stooping, kneeling, crouching and crawling. (R. 207.) Dr. Patterson gave him no manipulative, visual, communicative or environmental limitations. (R. 208-09.) In June 1997, that evaluation was affirmed by B. Kushner, M.D., another state agency physician. (R. 212.)

Dr. Sabugo, Plaintiff's family physician, thereafter provided a one-page summary of Plaintiff's medical records from January 30, 1997 to December 21, 1998. Her diagnoses included degenerative osteoarthritis, chronic low back pain secondary, hypertensive cardiovascular disease and weakness and numbness in the right upper extremity. (R. 236.) Dr. Sabugo noted that Plaintiff was taking Naproxen, an anti-inflammatory drug used to relieve symptoms of arthritis, Cardizem and a third medication for severe pain. (R. 236.) Copies of blood work done on January 7, 1997 and December 4, 1998 were attached to the report. (R. 237-38.)

4. Administrative Hearing

At the January 14, 1999 administrative hearing, Plaintiff testified about the extent of his alleged disability. (R. 68.) He indicated, "[h]alf the time I wake up and can't even move. Oh, boy. And, I stay in a lot of pain. I lost a lot of jobs by . . . I couldn't go to work behind that." (R. 68.) He stated that he had not worked since November 1985. (R. 69.) Plaintiff further remarked that, although he had been to the emergency room twice due to hypertension, he had only been hospitalized when he was shot. (R. 71-72.) Plaintiff indicated that he had walked three to four blocks to attend the hearing and that he could stand about twenty minutes. (R. 73, 75.) He stated that he could not climb stairs too often and could only lift about five pounds. (R. 77-78.)

As to his daily activities, Plaintiff explained that, for the past ten years, he had been getting up at approximately 1:00 to 2:00 p.m. (R. 79-80.) He did no chores around the house since his family usually came by to do them for him. (R. 81.) His sole social activity was sitting with his family and talking. (R. 80-81, 84.) Further, the only physician he saw was Dr. Sabugo. (R. 81.) He testified that he watched approximately one half-hour to one hour of television per day and otherwise slept most of the day. (R. 84.)

Following Plaintiff's testimony, the ALJ questioned the VE

regarding Plaintiff's capacity to perform substantial gainful activity. In his first hypothetical, the ALJ asked the VE to fully credit all of Plaintiff's testimony regarding all limitations from all sources. (R. 85.) The VE indicated that, according full weight to Plaintiff's testimony that he spends most of the day sleeping, she could identify no jobs for him. (R. 85.) In a second hypothetical, the ALJ asked the VE to consider Plaintiff's age, education and past relevant work experience, assume that he could regularly lift and carry ten pounds and occasionally twenty pounds, afford him the option to sit and stand at his own discretion and assume that his walking and standing is limited. Further, the ALJ instructed the VE that, although Plaintiff has no impairment of the upper extremity for gross movement, he should not be doing any fine-fingered manipulation with the right upper extremity, should not drive, should not work at heights and should not work around dangerous machinery with moving parts. (R. 85-86.) Based on the second hypothetical, the VE opined that Plaintiff was capable of performing certain unskilled, entry-level jobs at a light exertional level, including a hand packer, an assembler and an interviewer. (R. 87-88.)

5. ALJ's Decision

On June 25, 1999, the ALJ rendered his decision finding

Plaintiff not disabled. Specifically, he determined that Plaintiff had a history of a cerebrovascular accident, a back problem and a right shoulder problem, all of which constituted severe impairments, but did not meet or equal any of the Listings in Appendix 1, Subpart P, Regulation No. 4. He deemed Plaintiff's knee problem, foot problem, leg problem, arthritis, adjustment disorder with depressed mood, hypertension, blurry vision, shortness of breath and diabetes to be non-severe impairments. (R. 28.) Thereafter, the ALJ found Plaintiff's allegations of totally disabling limitations of pain not entirely credible and concluded that he had the residual functional capacity to perform the exertional demands of a limited range of light work. (R. 29.) Crediting the VE's testimony, the ALJ noted that Plaintiff could perform other jobs in the local and national economy, thereby making him not disabled under the Social Security Act. (R. 30.)

II. STANDARD OF REVIEW

The Social Security Act provides for judicial review of any "final decision of the Commissioner of Social Security" in a disability proceeding. 42 U.S.C. § 405(g). The district court may enter a judgment "affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." Id. However, the

Commissioner's findings "as to any fact, if supported by substantial evidence, shall be conclusive." Id. Accordingly, the Court's scope of review is "limited to determining whether the Commissioner applied the correct legal standards and whether the record, as a whole, contains substantial evidence to support the Commissioner's findings of fact." Schwartz v. Halter, 134 F. Supp. 2d 640, 647 (E.D. Pa. 2001).

Substantial evidence has been defined as "more than a mere scintilla" but somewhat less than a preponderance of the evidence, or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Jesurum v. Sec. of the United States Dep't of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995). The standard is "deferential and includes deference to inferences drawn from the facts if they, in turn, are supported by substantial evidence." Schaudeck v. Comm'r of S.S.A., 181 F.3d 429, 431 (3d Cir. 1999).

In reviewing Magistrate Judge Smith's Report and Recommendation, this Court must review de novo only "those portions" of the Report and Recommendation "to which objection is made." 28 U.S.C. § 636(b)(1).

III. DISCUSSION

Plaintiff filed objections to Magistrate Judge Smith's Report and Recommendation. First, Plaintiff argues that he did not knowingly waive his right to counsel and was prejudiced by the lack of counsel. Second, Plaintiff contends that the ALJ failed in his duty to analyze the evidence by mischaracterizing the conclusions of Dr. Goldstein. Third, Plaintiff claims that the ALJ failed in his duty to develop the record with respect to Plaintiff's mental impairments. Finally, Plaintiff argues that the ALJ erred in relying on the testimony of the VE to determine that jobs existed in sufficient numbers in the national economy for a person with Plaintiff's limitations.

Magistrate Judge Smith, in his thorough and well-reasoned Report and Recommendation, found that the ALJ's determination met the substantial evidence threshold. Plaintiff's objections to the Report and Recommendation reassert the very same arguments presented to Magistrate Judge Smith. Nevertheless, upon independent review and consideration of the entire record, this Court addresses each of Plaintiff's objections in turn.

A. Plaintiff's Right to Counsel

Plaintiff objects to the characterization of his attempts to obtain counsel, specifically, that his inability to obtain

counsel "constitutes an effective and implicit waiver." Report and Recommendation at 16. Plaintiff objects that the Report and Recommendation places undue emphasis on the number of times that he appeared before the ALJ, and fails to afford due weight to his explanation that he was expecting to be represented at the hearing and did not understand why the person whom he believed was representing him did not appear.

A claimant who wishes to be represented by counsel at a social security hearing may have that representation. 42 U.S.C. § 406. An ALJ that informs claimants of their right to representation by counsel during the administrative hearing should also state that counsel is available to represent indigent claimants without charge. Singleton v. Schweiker, 551 F. Supp. 715, 721 (E.D. Pa. 1982). The United States Court of Appeals for the Third Circuit has determined, however, that the mere lack of counsel is not sufficient cause for remand, without some showing of either clear prejudice or unfairness at the administrative level. Domozik v. Cohen, 413 F.2d 5, 9 (3d Cir. 1969).

Plaintiff argues that the ALJ proceeded with the January 14, 1999 hearing over his objections, citing to an exchange with the ALJ wherein Plaintiff states that he believed he was represented by an attorney who did not appear at the hearing. (See R.48-51, 55, 70-71.) However, a review of yet other communications, and exchanges that took place between Plaintiff and ALJ, demonstrates

a repeated emphasis that the burden fell on Plaintiff to secure counsel. Specifically, after Plaintiff requested an administrative hearing, by letter dated August 19, 1997, he was notified of his right to representation and given a list of referral sources that would represent him on a gratuitous basis. (R. 106-07.) The matter was then listed for hearing on July 1, 1998, at which Plaintiff failed to appear, allegedly, as a result of a transportation strike. The hearing was re-listed for November 17, 1998, and, while Plaintiff appeared at this time, he did so without an attorney. An extensive exchange took place between the ALJ and Plaintiff on November 17, 1998 wherein the ALJ inquired about Plaintiff's status with representation, and asked whether he needed additional time to secure representation. Plaintiff said that he did. The ALJ explained that he would not re-list the hearing again, that Plaintiff indeed should start obtaining representation immediately, and provided Plaintiff with a list of referral sources who would provide gratuitous services. Plaintiff agreed that he would take the steps necessary to secure counsel for the next hearing. (R. 38-42.)

Notwithstanding the ALJ's emphasis that it was Plaintiff's burden to find counsel, Plaintiff appeared at the January 1999 hearing without an attorney. When the ALJ inquired into the situation, Plaintiff explained that he had contacted an attorney who he believed would appear on his behalf, but did not do so.

(R. 49.) The ALJ asked Plaintiff why no Appointment of Representation form had been filed, and Plaintiff provided no explanation. (R. 49.) The ALJ decided to move forward with the hearing, despite plaintiff's indications that he did not understand the proceedings and that he just wanted to "get it over with." (R. 50.)

While Plaintiff did not explicitly agree to waive his right to an attorney, the repeated opportunities that Plaintiff had to secure counsel, coupled with Plaintiff's failure to do so over the course of seventeen months, demonstrates a passivity that militates against the relief Plaintiff requests. While Plaintiff claims that he had met with an attorney that agreed to represent him at the January 1999 hearing, there is no indication that representation had indeed been secured, since there was no evidence of a filing of the Appointment of Representation form.

The ALJ accommodated Plaintiff on several occasions, extended to Plaintiff opportunities to obtain counsel, and excused his proclaimed ignorance of the hearing process. After a thorough and independent review of the record, wherein any indication of clear prejudice or unfairness by the ALJ is absent, Plaintiff's mere lack of counsel during the January 1999 hearing is insufficient cause for remand by this Court. Plaintiff, however, attempts to demonstrate clear prejudice by making the following arguments in support of his assertion that the record

is flawed due to the lack of representation. For the following reasons, we find that Plaintiff has made no such showing of clear prejudice.

B. Dr. Goldstein's Conclusions

Plaintiff contends that the Report and Recommendation fails to recognize the critical importance of the ability to stand throughout the workday as an essential component of both light and medium work. Thus, Plaintiff objects to the conclusion contained therein that Dr. Goldstein's assessment that Plaintiff is limited to standing/walking for two to less than six hours is consistent with an ability to stand/walk "approximately" six hours, as characterized by the ALJ.[3] The ALJ stated as follows: "Martin Goldstein, M.D. supported the above assessment on February 11, 1997, although he reported the claimant could perform medium exertion . . . The undersigned affords the claimant the benefit of any doubt and, therefore, limits him to a modified portion of light work." (R. 26. (emphasis added))

[3] Plaintiff appears to take issue with the physical location of Dr. Goldstein's check mark on the Medical Source Statement of Claimant's Ability to Perform Work-Related Physical Activities in the category of "Standing & Walking." Plaintiff claims that a close look at the form indicates that the mark is actually between "less than 2 hours" and "2 to less than 6 hours," and that it is nowhere near "6 or more hours." (R. 224.)

"Light work," as defined in the regulations,

> involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 416.967(b). "Medium work" involves "lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds," together with the sit/stand requirements of light work. Id. at § 416.967(c). A full range of light or medium work requires standing or walking, off and on, for a total of approximately six hours in an eight-hour work day to meet the lifting requirements. See Jesurum v. Sec. of Health & Human Servs., 48 F.3d 114, 119 (3d Cir. 1995); Social Security Ruling 83-10.

Dr. Goldstein, upon consideration of Plaintiff's impairments, limited him to lifting up to fifty pounds, standing and walking between two and six hours in an eight-hour work day, and sitting six or more hours in an eight-hour work day. (R. 224.) With the possible exception of Plaintiff's standing and walking capability, Dr. Goldstein's evaluation otherwise cleared Plaintiff for medium work. Indeed Dr. Goldstein's indication

that Plaintiff is restricted to up to six hours per day of standing and walking does not preclude Plaintiff from being capable of standing and walking, perhaps at varying intervals, for up to six hours per day. Accordingly, the ALJ had substantial record evidence to determine that Plaintiff could walk and stand approximately six hours a day, and was, thus, capable of medium work.

Even if the ALJ's interpretation is mistaken, as Plaintiff suggests, no clear prejudice has resulted to Plaintiff as a result of not being represented by counsel at the January 1999 hearing. The record demonstrates that the ALJ gave Plaintiff the benefit of the doubt and limited him to a modified portion of light work with a sit/stand option. (R. 26.) Further, the residual functional capacity assessment is well-supported by record evidence. Specifically, Dr. Sabugo gave Plaintiff no limitation on standing or walking. (R. 217.) As well, the state consultative physician's report noted that Plaintiff could stand about six hours in an eight-hour work day. (R. 206.)

C. Plaintiff's Mental Impairment

Plaintiff next argues that the ALJ did not sufficiently develop the record with regard to Plaintiff's mental impairment, and should have ordered further medical reports. Plaintiff now

asserts that, since the ALJ neglected to do so, his decision is not supported by substantial evidence.

Where there is evidence of mental impairment that allegedly prevents a claimant from working, the Commissioner must follow the procedure set forth in 20 C.F.R. § 404.1520a. Plummer v. Apfel, 186 F.3d 422, 432 (3d Cir. 1999). "These procedures are intended to ensure a claimant's mental health impairments are given serious consideration by the Commissioner in determining whether a claimant is disabled." Id. Under these procedures, the ALJ must first evaluate the claimant's pertinent symptoms, signs, and laboratory findings to determine whether he or she has a medically determinable mental impairment. 20 C.F.R. § 404.1520a(b)(1). If a medically determinable mental impairment is found, the ALJ must then rate the degree of functional limitation resulting from the impairment. § 404.1520a(b)(2). To perform this latter step, the ALJ should assess the claimant's degree of functional limitation in four areas: (1) activities of daily living; (b) social functioning; (c) concentration, persistence or pace; and (d) episodes of decompensation. § 404.1520a(c)(3). If the degree of limitation in the first three functional areas is "none" or "mild," and "none" in the fourth area, the ALJ will generally conclude that the impairment is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in the claimant's ability to do

basic work activities. § 404.1520a(d)(1).

To assist with the severity determination, the ALJ must complete a standard document called a "Psychiatric Review Technique Form" ("PRTF"), which is essentially a checklist that tracks the requirements of the Listings of Mental Disorders. Woody v. Sec. of Health & Human Servs., 859 F.2d 1156, 1159 (3d Cir. 1988) (citing 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12 (1987)). The regulations permit an ALJ to complete the form without the assistance of a medical adviser, but "there must be competent evidence in the record to support the conclusions recorded on the form and the ALJ must discuss in his opinion the evidence that he considered in reaching the conclusions expressed on the form." Id. (citing 20 C.F.R. § 404.1520a(c)(4)). An ALJ is not required to employ the assistance of a qualified psychiatrist or psychologist when making an initial determination of mental impairment. Plummer, 186 F.3d at 433.

Following a reasoned analysis of the record, the ALJ in this matter determined that Plaintiff's alleged mental impairment was nonsevere, "resulting in at most slight restrictions which do not affect [Plaintiff's] ability to work." (R. 25.) Analyzing the four areas of functioning, the ALJ determined that Plaintiff had no restrictions in activities of daily living, no difficulties in maintaining social functioning, no deficiencies of concentration, no episodes of deterioration at work or in work-like settings,

and no evidence of symptoms resulting in a complete inability to function independently outside the area of his home. (R. 25.) The ALJ attached the PRTF to his opinion, and concluded that Plaintiff's adjustment order with depressed mood "[did] not constitute a severe impairment for adjudication purposes at any point in time relevant to his claims." (R. 25.)

There is little evidence in the record to warrant reversal of the ALJ's decision. Dr. Goldstein, after one examination, diagnosed Plaintiff with, among other things: "Adjustment disorder with depression by observation and patient's description of his unhappiness of not being able to work." (R. 223.) There was no further discussion of Plaintiff's depression, nor was there any evidence of needed therapy, medication or other treatment. Furthermore, Dr. Goldstein did not indicate that this depression was the source of any limitation. Moreover, Plaintiff's own treating physician, Dr. Sabugo, did not note any type of mental impairment.

Plaintiff also argues that his own testimony should have alerted the ALJ to the presence of a mental condition. Specifically, Plaintiff stated in his Request for Hearing: "I am withdrawn, my brother has to take me where I want." (R. 193.) Plaintiff also testified, and the ALJ recognized, that Plaintiff had curtailed even the most simple daily activities. (R. 24, 80-81.) Such testimony, however, was well-addressed by the ALJ in

his opinion when he determined that such inactivity was not due to a psychiatric impairment. (R. 25.) Indeed, Plaintiff's own testimony regarding his belief as to why he is disabled and unable to work suggests only the presence of "a lot of pain." (R. 68.) Plaintiff never suggested that his mental state was a limiting factor. Accordingly, we reject Plaintiff's arguments, and the ALJ's determination shall not be disturbed.

D. Testimony of the Vocational Expert

Finally, Plaintiff contends that testimony of the VE does not, by itself, provide substantial evidence of a significant number of jobs in the economy that Plaintiff can perform. Specifically, Plaintiff objects to the conclusion contained in the Report and Recommendation that there is no conflict between the VE's testimony and the Dictionary of Occupational Titles (4th ed. 1991) ("DOT"). Plaintiff alleges that there is a conflict, and that since the ALJ failed to resolve this conflict in his opinion, it lacks the support of substantial evidence.

Social Security Ruling 00-4p states that "[o]ccupational evidence provided by a VE . . . generally should be consistent with the occupational information supplied by the DOT." Social Security Ruling 00-4p (Dec. 4, 2000). Consequently, "[w]hen there is an apparent unresolved conflict between VE . . .

evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE . . . evidence to support a determination or decision about whether the claimant is disabled." Id. Neither the DOT nor the VE's testimony automatically trumps the other in the event of conflict, rather, the conflict must be resolved by the ALJ. Id. This duty of inquiry is an affirmative responsibility on the part of the ALJ. Id. The Third Circuit has interpreted this ruling as requiring the ALJ to elicit a reasonable explanation for the apparent conflict, that the explanation be made on the record and that the ALJ explain in his decision how the conflict was resolved. Burns v. Barnhart, 312 F.3d 113, 127 (3d Cir. 2002).

In this case, the VE testified that an individual with the limitations posed in the ALJ's hypothetical could still perform the jobs of interview-survey taker, assembler and hand-packer. Plaintiff contends that the VE's testimony conflicts with the DOT. According to the DOT, a "survey worker" or "interviewer" is considered light work. DOT 205.367-054. While there is a range of packer positions, the DOT provides that all are classified, at minimum, at the light exertional level. See, e.g., DOT 920.685-038 "Case Packer and Sealer" (light work); DOT 784.687-042 "Inspector-Packer" (light work); DOT 920.685-054 "Cotton Roll Packer" (light work); DOT 920.698-082 "Dental Floss Packer" (light work). The assembler position entails primarily light

work. See, e.g., DOT 369.687-010 “Assembler” (light work); DOT 669.685-014 “Basket assembler” (light work); DOT 685.685-014 “Pattern assembler” (light work); DOT 690.685-394 “Sport-shoe-spike assembler” (light work).

The foregoing positions identified by the VE match those that can be performed by an individual with Plaintiff’s limitations. Since there is no inconsistency between the VE’s testimony and the listings in the DOT, the ALJ was under no duty to resolve any conflict. This conclusion would not have been different if Plaintiff was represented by counsel at the hearing.

III. CONCLUSION

Upon a thorough and independent review of the record, for these foregoing reasons, this Court **OVERRULES** Plaintiff’s objections, and **APPROVES** and **ADOPTS** Magistrate Judge Smith’s thorough and well-reasoned Report and Recommendation as supplemented by this Memorandum. Accordingly, Defendant’s Motion for Summary Judgment is **GRANTED** and Plaintiff’s Motion for Summary Judgment is **DENIED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY DESHIELDS, Plaintiff,	:	CIVIL ACTION
v.	:	
JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	:	No. 02-8426

O R D E R

AND NOW, this day of February, 2004, upon careful and independent consideration of United States Magistrate Judge Charles B. Smith's Report and Recommendation (Doc. No. 23) and Plaintiff Stanley DeShields' ("Plaintiff") Objections thereto (Doc. No. 24), **IT IS ORDERED** that:

1. Plaintiff's Objections to Magistrate Judge Smith's Report and Recommendation are **OVERRULED**.

2. Magistrate Judge Smith's Report and Recommendation is **APPROVED** and **ADOPTED** as supplemented by the foregoing memorandum.

3. Plaintiff's Motion for Summary Judgment is **DENIED**.

4. Defendant's Motion for Summary Judgment is **GRANTED**.

5. The Clerk of Court is hereby directed to mark this case closed for administrative purposes.

BY THE COURT:

_____
JAMES McGIRR KELLY, J.